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IN THE

Supreme Court of the United States

October Term 1963

No. 761

REGINALD M. GREEN, HARRY L. SNEAD, ANDRE P. SMITH and WILLIE F. RUCKER,

Petitioners,

—v.—

VIRGINIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioners,

—v.—

VIRGINIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Appeals of Virginia, entered in the above-entitled cases October 17, 1963.

Citation to Opinions Below

The opinions and judgments or orders of the Supreme Court of Appeals are not reported and are set forth in the appendix hereto, *infra*, pp. 17-20. The Hustings Court of the City of Richmond entered judgment without opinion (Tr. 33).[1]

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[1] Citations are to the typewritten transcript of proceedings in the Hustings Court of the City of Richmond.

Jurisdiction

The judgments of the Supreme Court of Appeals of Virginia were entered October 17, 1963, *infra*, pp. 17-20.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

Were Negro sit-in demonstrators' rights under the Fourteenth Amendment violated by conviction of trespass for having remained at a restaurant counter in disregard of orders to leave where:

(1) The decision not to serve petitioners was removed from the sphere of private choice by state statutes requiring racial segregation at "any place of . . . public assemblage";

(2) The trial court refused to permit petitioners to develop evidence of the reasons they were ordered to leave the restaurant;

(3) The state has used its judicial machinery to enforce racial discrimination, where the discrimination was caused at least in part by a segregation custom substantially supported by state laws, and where the state's regime of laws has failed to protect petitioners' claim to equality by subordinating it to a narrow and technical claim of property right to racially discriminate in a place of public accommodation?

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Section 18.1-173 of the Code of Virginia:

> *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

3. This case involves also §18.1-356 of the Code of Virginia:

> *Duty to separate races at public assemblages.*—Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show

or place of public entertainment or public assemblage certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons, and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense.

4. This case involves also §18.1-356 of the Code of Virginia:

Failure to take space assigned in pursuance of preceding section.—Any person who fails, while in any public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the manager, usher or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher or other person, as aforesaid, to change his seat from time to time as occasion requires, in order that the preceding section may be complied with, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than twenty-five dollars for each offense. Furthermore such person may be ejected from such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage by any manager, usher or ticket taker, or other person in charge of such public

hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, or by a police officer or any other conservator of the peace, and if such person ejected shall have paid admission into such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage, he shall not be entitled to a return of any part of the same.

Statement

Petitioners, four Negro students at Virginia Union College, were tried together and convicted[2] in the Hustings Court of the City of Richmond, sitting without a jury, February 25, 1963, of violating Section 18.1-173 of the Code of Virginia in that they remained "upon the premises of National White Tower System, Incorporated . . . after having been forbidden to do so."[3]

At approximately 10:30 to 11:00 p.m. on the 8th of January, 1963, petitioners seated themselves at the counter of a White Tower restaurant in Richmond, Virginia (Tr. 4). They were approached by the restaurant supervisor, who "told them that they would not be served and to please leave. They refused" (Tr. 4). He called the Richmond Police Department (Tr. 5), and in the presence of police officers told petitioners to leave (Tr. 5), but he did not

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[2] Petitioners were tried and convicted in one proceeding in the Hustings Court (Tr. 3). They received identical sentences and filed joint Notice of Appeal and Assignments of Error (Tr. 33). On appeal to the Supreme Court of Appeals of Virginia, each petitioner filed separate, though identical, Petitions for Writ of Error and the Petitions were denied by the Supreme Court of Appeals in four separate, though identical, orders, *infra*, pp. 17-20.

[3] See the "original warrants" in the Hustings Court.

inform petitioners of the reason he was asking them to leave (Tr. 8).

The restaurant was open for business and white customers were present and being served at the time, but only Negroes were asked to leave (Tr. 7, 10, 28). The restaurant was not crowded (Tr. 8) and petitioners were not disorderly (Tr. 8) or "anything like that" (Tr. 8, 9). There was "no disorderly conduct on the part of anyone" (Tr. 17).

The arresting officer, Frank Duling, testified he "received information there was a set-in (sic) demonstration" (Tr. 13) and arrived at the White Tower to find "15 colored males inside the White Tower" (Tr. 13). The restaurant supervisor told Duling that the Negroes had been told to leave and asked Duling to ask them to leave (Tr. 13). "Then," according to Duling, the supervisor "went to each individual sitting there and made the following statement: 'I am George Polhemus. I am manager of this restaurant. You will not be served here, please leave'" (Tr. 14). Some of the Negroes left the restaurant, but petitioners Smith, Snead and Rucker made no move to leave and were arrested (Tr. 14).

Petitioner Green was "just standing there" and Duling "did not see Mr. Green sitting at the counter at any time." But Duling asked Green if he was going to leave and Green replied that "no one had asked him to leave" (Tr. 14). Green was then told to leave by the supervisor (Tr. 14, 15). He requested to speak to Smith, Snead and Rucker (Tr. 15) and was told "if he did not leave, as requested by the manager, that he, too, would be arrested." When he did not leave, he was placed under arrest (Tr. 15).

The trial judge repeatedly refused to permit petitioners' counsel to inquire into the reasons petitioners were refused service and asked to leave (Tr. 7, 9, 10, 11, 12, 18, 25). When

counsel asked the supervisor why he would not serve petitioners, objection was sustained on the ground that:

> That is immaterial to the case. The question is whether they were in violation of orders of the supervisor (Tr. 7).

Although "no one" was disorderly (Tr. 17) and the arresting officer testified that he was called to the White Tower because of a "set-in (sic) demonstration" (Tr. 13), the manager was not permitted to state if there "was any reason why you would not serve them other than they are Negroes?" (Tr. 9). The city attorney took the position that the reason they were asked to leave was immaterial for the reason that "they were told to leave and there was no reference to race . . ." (Tr. 25) and the rulings of the trial court were in accord with this position (Tr. 7, 9, 10, 11, 12, 18, 25).

Petitioners were found guilty and fined $10 each and costs (Tr. 33).

Petitioners filed timely petitions and supplemental petitions for writ of error in the Supreme Court of Appeals of Virginia. These petitions were denied October 17, 1963, *infra*, pp. 17-20. Denial of writ of error by the Supreme Court of Appeals has the effect of affirming the judgment of the trial court, *Ibid.*

How the Federal Questions Were Raised and Decided Below

At the conclusion of the state's evidence in the trial court and again prior to judgment, petitioners moved to strike the evidence against them on the ground that conviction on the evidence adduced would place the authority of the state behind private prejudice (Tr. 19-21, 30-32).

These motions were overruled (Tr. 21, 33). Petitioners' counsel also sought unsuccessfully to develop evidence of the reason petitioners were refused service (Tr. 7, 9, 10, 11, 12, 18, 25).

Petitions and supplementary petitions (filed with leave of Court) for writ of error raised the question under the Fourteenth Amendment

> whether a concern licensed to do business with the general public can legally, after inviting members of the general public into the store, order them to leave such establishment when such invitees are not disorderly and do not violate any law; and if so . . . whether the State can legally enforce such private discrimination where such discrimination is based upon race and color.

Petitioners also claimed violation of Fourteenth Amendment rights in that the trial court erred by "repeatedly refusing to permit defendants to inquire into the reasons why defendants were not served and were ordered out of the public eating place."

Petitioners also claimed violation of Fourteenth Amendment rights in that state statutes compelled racial discrimination on the part of the restaurant:[4]

> Code of Virginia, 1960 Replacement Volume, Sec. 18.1-356 and 18.1-357 supports the policy of racial segregation enforced by the restaurant. *Sec. 18.1-356 and 18.1-357 require segregation and removed the decision of the restaurant manager from the sphere of private choice.* Defendants' convictions were, therefore, obtained in violation of the due process clause

[4] See Supplemental Petitions for Writ of Error.

and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (Emphasis supplied.)

October 17, 1963, the Supreme Court of Appeals denied petitions for writ of error on the ground that the judgment of the trial court was "plainly right," *infra*, pp. 17-20. The Court stated the effect of denial "is to affirm the judgment of the said Hustings Court," *Ibid.*

ARGUMENT

I.

The State by Reason of Statutes Requiring Segregation at "Any Place of . . . Public Assemblage" Was Involved to a Significant Extent in the Refusal to Serve Negro Petitioners.

At the time petitioners were refused service and ordered to leave the restaurant, January 8, 1963, Virginia law provided criminal penalties for failure to observe racial segregation at "any place of . . . public assemblage." Code of Virginia, 1960, §§18.1-356 and 18.1-357. These penalties applied to the enterprise at which failure to observe segregated seating took place, §18.1-356 and to persons failing to observe segregated seating arrangements, §18.1-357. These statutes were declared unconstitutional by the Supreme Court of Appeals of Virginia September 11, 1963, *Brown* v. *City of Richmond*, —— Va. ——, 132 S. E. 2d 495;[5] see also *Blackwell* v. *Harrison*, 221 F. Supp. 651 (E. D. Va. 1963).

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[5] Petitioners' convictions were affirmed October 17, 1963, *infra*, pp. 17-20.

The application of §§18.1-356 and 18.1-357 to restaurants is not a question to which the Supreme Court of Appeals has addressed itself.[6] The opinion of that Court in *Brown* v. *City of Richmond*, *supra*, did not discuss the question. One federal court, however, has found restaurant segregation compelled by the statutes, *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949); another federal court, on concession of a party, has proceeded on the assumption that it was not, *Williams* v. *Howard Johnson Restaurant*, 268 F. 2d 845 (4th Cir. 1959).[7]

It is settled that if petitioners had been asked to leave the restaurant by reason of the command of these statutes, their convictions for trespass could not stand under the Fourteenth Amendment, *Peterson* v. *City of Greenville*, 373 U. S. 244:

> When the State has commanded a particular result it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in and, in fact, has removed that decision from the sphere of private choice.

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[6] This Court vacated judgments in light of *Peterson* v. *Greenville*, *supra*, in *Randolph* v. *Virginia*, 374 U. S. 97; *Henry* v. *Virginia*, 374 U. S. 98; *Thompson* v. *Virginia*, 374 U. S. 99; *Wood* v. *Virginia*, 374 U. S. 100, prior to the judgment affirming petitioners' conviction here, but the Supreme Court of Appeals has not taken any action on the remand of these cases.

[7] The Attorney General of Virginia (in response to an inquiry from a municipality that still, it seems, desired to enforce the segregation laws in accordance with their just construction) gave it as his opinion that the statute did not require restaurant segregation, but he relied wholly on the rule of *ejusdem generis*, hardly a satisfying guide for a restaurant manager. Opinion of the State Attorney General to the Commonwealth Attorney of the City of Roanoke, Aug. 24, 1960, 5 Race Relations Law Reporter 1282 (1960).

And this is true "even assuming . . . that the manager would have acted as he did independently of the existence of the Ordinance" for the "convictions had the effect, which the state cannot deny, of enforcing the Ordinance . . . " *Peterson, supra.*

In *Lombard* v. *Louisiana*, 373 U. S. 267, there was no segregation provision but "evidence tended to indicate that the store officials' actions were coerced by the city" and, therefore, the "city must be treated exactly as if it had an ordinance prohibiting such conduct." *Lombard, supra.*

Applicable to "any place of . . . public assemblage," there is no reason why these statutes should not be read to compel restaurant segregation. This Court need not, however, resolve the question, for it is clear that restaurant proprietors might reasonably believe segregation required by the broad language of these statutes, and consequently conform their conduct to them. Such a result would be "coercion," *Lombard, supra*, sufficient to invoke the Fourteenth Amendment.

Regardless of whether §§18.1-356 and 18.1-357 of the Code of Virginia compel restaurant segregation, as in *Peterson*, or coerce it, as in *Lombard*, petitioners' convictions cannot stand. At the very least the uncertainty of the reach of these broad provisions is sufficient to encourage segregation and withdraw the decision to serve or not to serve Negroes from the purely private sphere. Cf. *Gantt* v. *Clemson Agricultural College of South Carolina*, 320 F. 2d 611, 613 (4th Cir. 1963). In this respect these provisions are like any statutes which due to vagueness and ambiguity may throttle protected conduct. See e.g., *Winters* v. *New York*, 333 U. S. 507; *Edwards* v. *South Carolina*, 372 U. S. 229.

Doubts as to the application of these statutes must be resolved in favor of petitioners, for here, as in *Lombard* v.

Louisiana, supra, "the evidence of coercion was not fully developed because the trial judge forbade petitioners to ask questions directed to that very issue." Petitioners' counsel was thwarted repeatedly in his efforts to ascertain the reasons for the failure to serve petitioners (Tr. 7, 9, 10, 11, 12, 18, 25). Denial of the opportunity to establish violation of a constitutional right is itself denial of a constitutional right. *Carter* v. *Texas,* 177 U. S. 442.

II.

Petitioners' Convictions Enforce Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

This petition presents for decision issues identical to those pending before this Court in *Barr* v. *City of Columbia,* No. 9, October Term, 1963; *Bouie* v. *City of Columbia,* No. 10, October Term, 1963; *Bell* v. *Maryland,* No. 12, October Term, 1963; *Robinson* v. *Florida,* No. 60, October Term, 1963; *Griffin* v. *Maryland,* No. 6, October Term, 1963. Those cases and this raise the question of a state's constitutional responsibility for acts of racial discrimination enforced by criminal convictions. Where a petition for certiorari presents questions identical with, or similar to, issues already pending before this Court in another case in which certiorari has been granted, the issues involved in the petition are obviously appropriate for review by certiorari. Compare *Trustee of Monroe Ave. Church of Christ* v. *Perkins,* 334 U. S. 813, with *Shelley* v. *Kraemer,* 334 U. S. 1.

Petitioners' convictions enforce racial discrimination in violation of the Fourteenth Amendment. This record shows racial discrimination despite the refusal of the trial judge to permit petitioners to develop evidence that race was

the reason they were ordered to leave the restaurant. The arresting officer testified that he was called to the restaurant because of a "set-in (sic) demonstration." It is well-known and commonly understood that a "sit-in" is a peaceful attempt by Negroes to obtain service at restaurants or other business enterprises which maintain a policy of racial exclusion or segregation. *Garner* v. *Louisiana*, 368 U. S. 157, 193 (Mr. Justice Harlan concurring). Upon arriving the arresting officer found "fifteen colored males" and only they (not white patrons) were ordered to leave. Despite the failure of the trial judge to permit evidence which would develop the precise reasons for the exclusion of petitioners, it is plain from this record that petitioners were excluded for their race. Cf. *Child Labor Tax Case*, 259 U. S. 20, 37.

The state is constitutionally responsible for racial discrimination under three related theories urged by petitioners:

First, the use of state judicial machinery to convict petitioners of a crime is a use of state power in the Fourteenth Amendment sense. *Shelley* v. *Kraemer*, 334 U. S. 1 is applicable and cannot properly be distinguished.

Second, state action is involved because the acts of discrimination were casually related at least in part to a segregation custom which law has substantially supported. See *e.g.* Code of Virginia, §§18.1-356 and 18.1-357; *NAACP* v. *Button*, 371 U. S. 415; *Johnson* v. *Virginia*, 373 U. S. 61; *NAACP* v. *Patty*, 159 F. Supp. 503 (E. D. Va. 1958).[8] State

[8] In Virginia whites and Negroes may not study together (Const. of Va. §140; Code of Va., 1960, §22-221), marry one another (Code of Va., 1960, §20-54), go to prison together (Code of Va., 1960, §53-42), join a fraternity together (Code of Va., 1960, §38.1-597), go together to the hospital for feebleminded (Code of Virginia, 1960, §37-183), wait for an airplane together (Code of Va. 1960, §56-196), get on a bus together (Code of Va., 1960, §56-326).

action is causally traceable into the discrimination practiced here. Segregation is all one piece; when the state holds up the edifice at a hundred points by law, it is surely contributing to its standing up even at the points where the law does not directly take hold. Moreover, the state has not shown a contrary, and the burden of proving otherwise should rest on the state in the circumstance of this case.

Finally, state power is involved to a significant degree in that the state's regime of laws fails to furnish protection to petitioners by subordinating their claimed rights to equality to a narrow and technical property claim. The state's role is not neutral; it has preferred the discriminator's insubstantial property claim to the petitioners' claim of equality. The Fourteenth Amendment overrides this state power, for equal protection of the laws requires the states to protect a claim of equality in such circumstances.

The theories of state action urged above may be limited in their incidents by an interpretation of the substantive meaning of the equal protection clause which recognizes other constitutional demands. Thus, the personal and private life of individuals need not be subjected to Fourteenth Amendment norms. Petitioners do not urge that no state action is needed under the Fourteenth Amendment, but rather that because it is usually present, a substantive rule applying the equal protection clause to the public life of the community is needed. See Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962).

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Denial of Writ of Error

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 17th day of October, 1963.

The petition of Reginald M. Green for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 25th day of February, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A copy, Teste:

H. F. TURNER
Clerk

Denial of Writ of Error

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 17th day of October, 1963.

The petition of Harry Lee Snead for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 25th day of February, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

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H. F. TURNER
Clerk

Denial of Writ of Error

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 17th day of October, 1963.

The petition of Andre Pierré Smith for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 25th day of February, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

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H. F. TURNER
Clerk

Denial of Writ of Error

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 17th day of October, 1963.

The petition of Willie Frank Rucker for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 25th day of February, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A copy, Teste:

H. F. TURNER
Clerk

RESPONSE

PETITION

WRIT OF

E TO

FOR

CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term 1963

No. 761

REGINALD M. GREEN, HARRY L. SNEAD, ANDRE P. SMITH and WILLIE F. RUCKER,

Petitioners,

v.

VIRGINIA.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

For the purposes of this Response, the questions presented by petitioners will be taken up in the order in which they were raised in the Petition.

The statement of facts will not be reiterated, as the transcript is a part of the record, and the facts are not in dispute.

ARGUMENT

I.

THE CASE AT BAR DOES NOT INVOLVE STATE STATUTES REQUIRING SEGREGATION AT "ANY PLACE OF * * * PUBLIC ASSEMBLAGE."

As stated in the Petition, at page 10, the Supreme Court of Appeals has not ruled on whether or not a private restaurant falls within the scope of Sections 18.1-356 and 18.1-357, which Statutes are set out on pages 3, 4, and 5 of the Petition, and at the time of the arrest of petitioners, did provide for racial separation at "* * * any public hall, theater, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons * * *."

It will be readily noted, however, that restaurants, taverns and other eating establishments are not mentioned, indicating a clear legislative intent that Section 18.1-356 should *not* apply to such establishments. Is it reasonable that the legislature would specifically name opera houses, but not restaurants, which are far more numerous in any community?

In this regard, the State's chief law officer, the Attorney General, in an opinion to the Commonwealth's Attorney of the City of Roanoke on August 24, 1960, ruled that restaurants do not come within the meaning of Section 18.1-356.

It is the position of the State that petitioners have injected this issue into the case in an effort to cloud the real issue, which is whether the operator of a private restaurant may select his customers. Further, there is absolutely nothing in the evidence in the case, either express or implied, to indicate that the restaurant manager was under any coercion or undue influence by the state or the municipality to enforce racial segregation.

II.

PETITIONER'S CONVICTIONS FOR TRESPASS VIOLATE NONE OF THE PROVISIONS OF THE UNITED STATES CONSTITUTION.

The Virginia trespass statute, Section 18.1-173 of the Code of Virginia, provides:

> "Trespass after having been forbidden to do so.—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

A. *Comparison With Common Law*

A trespass to real property is not a common law misdemeanor unless attended by circumstances constituting a breach of the peace or tending to a breach of the peace. *Henderson* v. *Commonwealth*, 8 Gratt. (49 Va.) 708, 56 Am. Dec. 160 (1852); *Miller* v. *Harless*, 153 Va. 228 (1929); 52 Am. Jur., Trespass, Sec. 84, p. 895; 87 C.J.S., Trespass, Sec. 140, p. 1101. However, where the conduct tends to or threatens a breach of the peace, the trespass is a crime. *Ibid.*

In Virginia physically aggressive conduct on the part of the trespasser is not necessary to constitute conduct tending to a breach of the peace. It is enough that the trespasser repeatedly refuses to comply with requests to leave the premises. Thus, in *Miller* v. *Harless*, 153 Va. 228 (1929), the Supreme Court of Appeals, in a false arrest action, held that the repeated refusal of two boys to leave the area of a football game at V.P.I., for which they held no tickets and which they were watching through the fence, was exasperating conduct, tending to violence and a breach of the peace, amounting to a criminal trespass for which they were liable to arrest.

It is an established principle of the common law that one who goes on the property of another with the owner's consent becomes a trespasser if he enters a part of the property for which the consent is not given, or if he remains on the property after he is informed that the consent has been withdrawn. Restatement, Torts, Subsection 169, 171. Furthermore, if one enters the premises of another with his consent and thereafter engages in conduct tending to or threatening a breach of the peace, he becomes guilty of a criminal trespass. *State* v. *Tyndall*, 192 N.C. 559, 135 S.E. 451, 49 A.L.R. 596 (1926); see Annotation, 49 A.L.R. 597 (1927). It therefore appears from an examination of Virginia's criminal trespass statute that it differs from the common law crime only in not requiring the element of conduct tending to a breach of the peace.

The purpose of the General Assembly in dropping this element was to protect more fully the rights of the owners or those in lawful control of private property. See *Hall* v. *Commonwealth*, 188 Va. 72, 77 (1948). By not requiring this common law element, the statute has the salutary effect of making it unnecessary for one lawfully in control

of property to rely on self help to repel the invasion of his property by a trespasser who has been warned to keep off, or to eject a trespasser who ignores requests to leave the premises, thereby avoiding disorder and bloodshed. See *6 Va. L. Reg.* 294-95 (1920-21). Indeed, this effect was recognized by the Virginia Supreme Court of Appeals, which brought the common law crime remarkably close to the statutory crime in announcing that repeated refusals to leave premises upon request is exasperating conduct tending to a breach of the peace. *Miller* v. *Harless, supra.*

B. *Validity*

Section 18.1-173 was construed and upheld in *Hall* v. *Commonwealth*, 188 Va. 72, appeal dismissed, 335 U.S. 875, 93 L. ed 418 (1948). There the accused, a minister of the Jehovah's Witnesses, entered the Monroe Terrace Apartments in Richmond for the purpose of calling on the tenants in each apartment to deliver religious tracts. Over the protest of the building attendant the accused proceeded to accomplish his purposes whereupon the manager caused him to be arrested under Sec. 18.1-173. The Supreme Court of Appeals of Virginia held that there was nothing in the statute which infringed upon any provision or right guaranteed under the Federal Constitution. The lower court conviction was affirmed.

In support of the validity of the Statute, it should be noted that statutory enactments in the nature of Section 18.1-173 are common.

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states (citing the Virginia statute, among others),

while similar statutes of narrower scope are on the books of at least twelve states more." *Martin* v. *Struthers*, 319 U.S. 141, 147, 87 L. ed. 1313, 1319 (1943).

C. *Application*

Section 18.1-173 does not require the custodian of the premises to identify himself nor may this requirement be reasonably implied. The bare fact that the person making the request to leave and authorizing arrest for failure to do so is lawfully in charge of the property is sufficient under the statute and at common law. *Hall* v. *Commonwealth*, 188 Va. 72 (1948); *Miller* v. *Harless*, 153 Va. 228 (1929). The accused disregards the request to leave at his peril and assume the risk that the custodian is not an imposter and does have such authority.

The common law and United States Constitution have imposed burdens and limitations on the absolute right of an owner to use his private property as he sees fit under certain unique circumstances. Thus, for example, it has been regarded as unlawful for an innkeeper to refuse accomodations to anyone conducting himself in a proper manner, *Jackson* v. *Virginia Hot Springs Co.*, 213 F. 969 (4th Cir. 1914); or for a theater to eject a guest who has purchased a ticket, *Hurst* v. *Picture Theaters, Inc.* (1915) 1 K.B. 1 (1914); *Barnswell* v. *Nat'l Amusement Co.*, 21 B.C.R. 431 (1915), although Virginia does not subscribe to this rule, *W. W. V. Co.* v. *Black*, 113 Va. 728 (1912); or for a company to deny the right of free speech on the streets of its privately owned town which in substance is the typical municipality, *Marsh* v. *Alabama*, 326 U.S. 501, 90 L. ed. 265 (1945).

However, these burdens and limitations apply only to special situations. The common law duty to serve exists only as to public officers, common carriers, innkeepers, public warehouse men and public utilities. No such obligation rests on ordinary citizens engaged in other activities. *Prosser, Torts*, p. 480 (2d ed. 1955).

Likewise, the Constitution limits an owner's dominion over his property only in the exceptional situation where the ownership is equal in effect to public ownership. See *Marsh* v. *Alabama*, 326 U.S. 501, 90 L. ed. 265 (1945), and compare with *Beard* v. *Alexandria*, 341 U.S. 622, 95 L. ed 1233 (1950). Cf., Note, *Constitutional Restrictions on a Lessee of Public Property*, 42 *Va. L. Rev.* 647 (1956); Casenote, 46 *Va. L. Rev.* 123 (1960); Recent Decision, 43 *Va. L. Rev.* 725 (1957).

D. *Right of Restaurant to Deny Service to anyone for Any Reason.*

The Supreme Court of Appeals of Virginia has held that a restaurateur is under no duty to serve all comers, and in its opinion pointed out the sharp distinction between a restaurateur and one whose occupation imposes upon him the common law duty to serve, namely, the innkeeper. *Alpaugh* v. *Wolverton*, 184 Va. 943 (1946).

As previously noted, at common law the innkeeper or hotel operator, because of the quasi-public nature of his business, was required to furnish proper accomodations in the way of lodging, food and the like, so far as they were available. Under this general rule the innkeeper could not select his guests, and everyone conducting himself in a proper manner had a right to receive accomodations. *Jackson* v. *Virginia Hot Springs Company*, 213 F. 969 (4th Cir., 1914); 9 Mi. Jur., Hotels, Inns and Restaurants 85, pp.

482-83. This common law duty of the innkeeper still applies in Virginia today.

The restaurateur on the other hand is not subject to the same duties and responsibilities as an innkeeper, nor is he entitled to the privileges of the latter. His rights and responsibilities are more like those of a shopkeeper and he is under no common law duty to serve everyone who applies to him. 9 Mi. Jur., Hotels, Inns and Restaurants, 82, pp. 480-81.

In *Alpaugh* v. *Wolverton*, *supra*, Alpaugh brought suit against Wolverton, the owner of an eating establishment, for damages by reason of Wolverton's refusal to serve Alpaugh. The lower court sustained the defendant's demurrer and on appeal this ruling was affirmed. The Supreme Court of Appeals stated:

> "In 28 Am. Jur., Innkeepers, section 46, p. 568, the author says: 'An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travelers, he cannot arbitrarily prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodations for them; nor can he arbitrarily refuse to continue to furnish a guest with proper accommodations.' * * *
>
> " * * * * "
>
> "Once the technical relation of innkeeper or hotelkeeper and guest has been established, the parties become subject to the duties, responsibilities and liabilities which attach to the relationship. Because of the *quasi* public nature of his business, the innkeeper must furnish proper accommodations in the way of lodging, food, etc., so far as they are available. * * * He becomes 'practically an insurer of the safety of property

instructed to his care' by the guest * * * and he incurs other responsibilities which need not be detailed here. In return, he has a lien on the property of his guest for the reasonable charges of such keep and entertainment, both at common law * * * and under our statute. * * *

"A restaurant, on the other hand, is an establishment where meals and refreshments are served. * * *

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privilges of the latter. * * * His rights and responsibilities are more like those of a shopkeeper. * * * He is under no common law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. * * *" *Id.* at 947-48.

See, also, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 549 (E.D. Va. 1949).

B. There Is No Constitutional Limitation On a Restaurateur's Right to *Deny Service to Anyone For any Reason*.

In any consideration of the Constitution of the United States it should be remembered that the limitations imposed by and through the Fourteenth Amendment apply only to State action. As stated in *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161 (1947):

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, 27 L. ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely pri-

vate conduct, however discriminatory or wrongful." *Id.* at 13, 92 L. ed. at 1180.

From this basic principle is derived the logical conclusion that it is constitutionally permissible for an owner to refuse to serve anyone on his privately owned premises for any reason whatsoever. A number of recent cases have reached this conclusion where the refusal has been upon purely racial grounds.

Probably the most important of these cases is *William* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959) noted, 46 *Va. L. Rev.* 123 (1960). In that case the complaining party sought a declaratory judgment that his exclusion from a Howard Johnson's Restaurant based on racial grounds amounted to discrimination against a person moving in interstate commerce as well as a aviolation of the Civil Rights Act of 1875. The argument further was made that inasmuch as the State of Virginia licenses restaurants to serve the public it thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities. The Fourth Circuit Court of Appeals speaking through Judge Soper affirmed dismissal of the suit holding that the position of the complainant was untenable on all of the grounds urged. Interestingly enough the court saw fit to make specific reference to the Virginia case of *Alpaugh* v. *Wolverton, supra*, drawing the distinction between the rights and duties of the innkeeper as compared with the restaurateur.

A more recent decision on this subject is *Black* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 121 (D.C. Mi 1960), a suit for declaratory judgment brought by a negro alleging violation her rights secured by the Constitution and laws of the United States. The plaintiff had been refused service in a White Tower restaurant because she was

a negro. The District Court dismissed the complaint, holding that the action complained of was private, not state, citing *Williams* v. *Howard Johnson's Restaurant*, *supra*, and that such action was not a burden on interstate commcommerce.

It should be noted that this federal decision involves the very factual situation presented in the instant case.

A third recent case is *Wilmington Parking Authority* v. *Burton*, 157 A. 2d 894 (Del., 1960). In that action declaratory judgment in the form of injunctive relief against the operator of a restaurant in a public building was sought to require the operator to refrain from refusing to serve the plaintiff solely because he was a negro. From a judgment for the plaintiff the defendant appealed and the Supreme Court of Delaware held that the operation of the restaurant in the structure of a parking authority (partially state supported) did not make the discriminatory act of the proprietor the act of the state within the prohibition of the Fourteenth Amendment. The court concluded that the parking authority and, through it, the State of Delaware, did not operate either directly or indirectly the business of the restaurant in question. The action taken was purely private and, therefore, the plaintiff had no basis for his suit.

Reference also should be made to *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295 (1958). There, Royal Ice Cream Company retailed ice cream and sandwiches in a building separated by a partition into two parts, each portion equipped with booths, a counter and stools. Over one door was a sign marked "White" and over the other door a sign marked "Colored". Sales were made to members of the different races only in the portions of the building as marked. The defendants, negroes, went to the Royal Ice Cream Company, parked their car in the rear of the estab-

lishment and proceeded through the back door to the portion of the store set apart for white patrons. The manager asked them to leave and told them that if they did not do so he would have to arrest them. When the defendants did not leave, warrants were issued under a North Carolina statute imposing criminal penalties for interference with possession or right of possession of real estate privately held. The defendants argued that they were deprived of their constitutional rights in violation of the Fourteenth Amendment of the United States Constitution. The North Carolina Supreme Court viewed the basic issue as being: Must a property owner engaged in a private enterprise submit to the use of his property by others simply because they are members of a different race? The court held that the Fourteenth Amendment of the Constitution of the United States had not been violated and the conviction of the lower court was affirmed. The defendants also contended that the particular trespassing statute involved had no application since it made criminal an "entry" after being forbidden. The court held that the meaning of the word "enter" should be so construed that one who remains after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and unauthorized.

Thus it is seen that the vague and nebulous theories of petitioners which attempt to make state discrimination out of a restaurant operator's choosing of customers, are rebutted by sound judicial decisions.

Indeed, even more convincing proof is offered by the "Public Accommodations" feature of the so-called "Civil Rights" Bill, currently being debated at length in the United States Senate. If petitioner's "claimed rights", and "claim of equality" arguments were valid, there would be no need for such legislation. The very clamor for such a

law from "civil rights" groups is an admission that the right of a private restaurant owner to choose his customers does exist in law and long standing custom.

Would this Court hold that Attorney X, because he is licensed by the state, must undertake to represent *anyone* who comes into his office, and offers him a fee? And would not the attorney be correct in calling upon police to arrest the offender for trespass, if he refused to leave the office? To hold otherwise would certainly admit that Orwell's *1984*, with its totalitarian police state, is a fact here, in 1964.

Petitioner's claim discrimination. Discrimination is as American as baseball, and as old as Bunker Hill. Does not the auto buyer discriminate against Ford when he buys a Chevrolet? Every man, woman and child in this country discriminates in a number of ways each and every day. We discriminate in the food we buy, the clothes we wear, the theater or restaurant we attend, or the friends we choose. The list is endless.

All the lofty arguments of the communists, socialists, "civil rights" groups, bleeding hearts and do-gooders to the contrary, it is the God-given *right* of every American to discriminate for any reason, including race, religion, color of hair, or whatever. It is interesting to note that unfortunately in certain "people's republics", this is not true today.

CONCLUSION

It is earnestly submitted that petitioners committed the crime of trespass in refusing to leave the premises in question after being ordered to do so by the manager, and that they were duly arrested, tried and convicted according to law, and for the reasons cited herein, the pepition of certiorari should be denied.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA

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